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No. 99-747

In the Supreme Court of the United States

HAROLD LEWIS,
Petitioner

v.

KMART CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The petition explains why certiorari is warranted to resolve the question whether the ADA permits discrimination between disabilities of mental and physical causation that *lacks an actuarial or other non-discriminatory justification.* By failing to address the question actually presented, respondent effectively demonstrates why this case merits review. Without so much as mentioning the core insurance concept of actuarial justification, the brief in opposition inaccurately accuses petitioner of reading the ADA to require "parity" between mental and physical disabilities in all events. But petitioner merely seeks equal allocation of wage-replacement benefits to employees having the same degree of disability, regardless of mental or physical causation, in the absence of sound actuarial principles. Pet. 5-6 & n. 4.

None of respondent's arguments warrants denial of the petition, which presents an issue affecting vast numbers of employees who are denied long-term wage-replacement benefits that employers bestow on incapacitated colleagues suffering from the same disability, *i.e.*, the medically certified inability to work. There is every reason to grant review in this case to stop employers from violating the ADA by discriminating—without actuarial or other justification—against the mentally disabled in favor of the physically impaired, in direct contradiction of the Court's unambiguous statement in *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999). The case is in the ideal posture for review, coming to this Court with a fully developed trial record. A further reason for review is the rapidly accelerating pace with which the courts of appeals are facing the question presented in this case—the Ninth and Tenth Circuits issued opinions on the subject in the brief period since the petition was filed.[1]

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[1] *Weyer v. Twentieth Century Fox Film Corp.*, No. 98-35215, 2000 U.S. App. LEXIS 11 (9th Cir. Jan. 3, 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999). *See infra* at 4 & n.3.

In that same period, the Second Circuit issued an opinion that generally supports petitioner's reading of the ADA. In *Pallozzi v. Allstate Life Insurance Co.*, No. 98-7552, 1999 U.S. App. LEXIS 31224 (2d Cir. Dec. 1, 1999), the Second Circuit addressed the ADA's pleading requirements under Title III where coverage was denied without actuarial justification. The court held that lack of actuarial justification need not be pleaded explicitly where the plaintiff alleged violations of state law and of Title III. *Id.* at *25. Thus, the Second Circuit left undisturbed the district court's underlying finding that "an individual may not be denied insurance coverage based on a disability unless such denial is based upon sound risk classification," and remanded the case for trial. *Id.* at *23 (citing *Pallozzi v. Allstate Life Ins. Co.*, 998 F. Supp. 204, 207 (N.D.N.Y. 1998)). In another case, *Leonard F. v. Israel Discount Bank*, No. 98-7320, 1999 U.S. App. LEXIS 32096 (2d Cir. Dec. 8, 1999), the Second Circuit decided a different issue under the ADA, but noted the district court's finding that the disparity in benefits was consistent with New York state law. Also, after the petition was filed, the Surgeon General issued a

1. There is no merit to respondent's contention that petitioner is relying "exclusively on footnote ten" of *Olmstead* (Br. in Opp. 3). Far from offering dictum or some inconsequential point, that footnote fortifies the foundation for the entire *Olmstead* ruling. The Court's majority rejected the dissent's notion that federal statutes do not prohibit discrimination among members of the same protected class, and explained the historical basis for construing the ADA to bar discrimination between the physically and mentally disabled.

Nor is there any merit to respondent's effort to distinguish *Olmstead* on the grounds that it interpreted Title II of the ADA, while the instant case arises under Title I. As even the lower court recognized, "there is no material distinction" between these two titles for purposes of deciding the question presented here. Pet. App. 9a. There is, accordingly, no basis for respondent's assertion (Br. in Opp. 5) that express statutory and regulatory language in Title II mandated the result in *Olmstead*, while Title I contains "no such explicit language." On the contrary, Title I *does* contain explicit language barring the challenged conduct with as much particularity as any Title II language noted in *Olmstead*.[2] Title I prohibits discrimination in providing "fringe benefits" (42 U.S.C. § 12112(b)), and Title V, which otherwise limits the application of Title I, exempts discrimination only where a bona fide benefit plan is based

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report documenting the societal stigma and prejudice that persists against mental illness. *See* U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* (issued Dec. 13, 1999).

[2] In any event, the supposed "explicit language" cited by respondent did not come from Title II, but rather was the Court's paraphrase of several ADA provisions supporting its conclusion. *See* 42 U.S.C. § 12101(a)(2), (3), (5).

on "underwriting risks," "classifying risks," or "administering such risks," and is "not inconsistent with State law." 42 U.S.C. § 12201(c)(2). The ADA thus expressly mandates plan distinctions based on traditional risk assessment and incorporates the Virginia insurance statute that bars distinctions in insurance coverage unless "based on sound actuarial principles." Va. Code Ann. § 38.2-508.

Despite this explicit statutory imperative, respondent offered no actuarial justification for cutting off wage-replacement benefits to the mentally disabled after two years, while awarding such benefits until retirement age to employees unable to work for physical reasons. In fact, the undisputed record demonstrates that there is no actuarial principle justifying respondent's discriminatory allocation of long-term wage benefits. Pet. 5-6; Pet. App. 45a.

2. Review is necessary to implement this Court's interpretation of the ADA as prohibiting discrimination between mental and physical disabilities. Summarily denying rehearing shortly after *Olmstead*, the Fourth Circuit became the first of three courts of appeals to ignore this Court's articulation of the ADA's antidiscrimination provisions, while incorrectly clinging to rulings under its predecessor, the Rehabilitation Act. *See Weyer v. Twentieth Century Fox Film Corp.*, 2000 U.S. App. LEXIS 11 (9th Cir. Jan. 3, 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999).[3] As the petition explains (Pet. 14-16), Rehabilitation

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[3] The Tenth Circuit, like the Fourth Circuit in the instant case, completely ignored *Olmstead*. In *Weyer*, the Ninth Circuit incorrectly rejected the applicability of *Olmstead* on grounds similar to those asserted by respondent. That is, the Ninth Circuit addressed whether the ADA requires parity in all circumstances, not whether the ADA requires that any disparity must be based on a valid justification. *Weyer*, 2000 U.S. App. LEXIS 11, at **31-35.

Act precedent does not conflict with petitioner's position nor could it possibly outweigh *Olmstead*'s controlling construction of the broader ADA. These latest cases confirm the need for this Court's review of the important and recurring question presented in this case. The continuing proliferation of decisions—based on the false premise that disparate treatment need not be justified—vividly highlights the need for this Court to clarify the import of *Olmstead* for the entire ADA.

3. There is no merit to respondent's reliance on the weakest and most unreliable form of legislative history—Congress's rejection of an amendment to an entirely different statute years after the ADA was enacted. By heavily relying on the Mental Health Parity Act of 1996, which addresses mental illness for health insurance plans but not for disability plans, respondent underscores the error of its statutory analysis. It is most dangerous to construe a statute (the ADA) in light of later legislative inaction, such as the MHPA's failure to include certain amendments. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted); *see United States v. Wise*, 370 U.S. 405, 411 (1962). It is just as likely that Congress did not address long-term benefit plans in the MHPA—by mandating "parity" or otherwise—because Congress was satisfied with the ADA's mandate that disparities in benefits be grounded in sound actuarial data. Indeed, the MHPA expressly excludes coverage of terms or conditions relating to mental health benefits other than lifetime caps or annual limits, suggesting that Congress intended the ADA to continue to govern insurance conditions not within the scope

of the MHPA. *Compare* 42 U.S.C. § 300gg-5(b)(2) with 42 U.S.C. § 12201(c).

More generally, respondent's recitation of views articulated years after enactment of the ADA is contrary to basic rules of statutory construction. Only the intent of the Congress that promulgated the ADA, not that of subsequent Congresses, has any relevance to the statutory construction question presented here. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 33-34 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) ("The views of members of a later Congress . . . are entitled to little if any weight"); *United States v. Price*, 361 U.S. 304, 313 (1960); *see also Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993) (the failure of future Congresses to enact subsequent measures has little if any bearing on interpretation of the statute at issue); *accord Hodgson v. Lodge 851, Int'l Ass'n of Machinists & Aerospace Workers*, 454 F.2d 545, 562 (7th Cir. 1971) (Stevens, J., dissenting) ("a provision in [a] controversial and integrated statute . . . cannot fairly be predicated on unexplained inaction by different Congresses in subsequent years").[4]

In any event, the MHPA offers no insight regarding even 1996 congressional understanding of the ADA because the more recent Act applies only to annual and lifetime dollar limits for mental and physical health insurance coverage under a group health plan, and requires complete parity between coverage for mental and physical illness unless such parity will increase the cost of the plan by more than one

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[4] Respondent's reliance on congressional failure to enact proposed 1997 Substance Abuse Treatment Parity legislation fails for the same reasons applicable to the MHPA. *See* Br. in Opp. 8-9, n. 3. The rejection of substance abuse parity is even less relevant to construing the ADA than is the MHPA's failure to cover disability benefits.

percent. *See* 42 U.S.C. § 300gg-5(c)(2). By contrast, the ADA prohibits discrimination in the provision of fringe benefits generally (including disability benefits not covered under the MHPA), and exempts any bona fide benefit plan with actuarially or medically justified terms. Accordingly, the passage of the MHPA is no help for respondent's incorrect construction of the ADA. *See* Note, *Must Insurers Treat All Illnesses Equally?*, 4 CONN. INS. L.J. 767, 787 n.87 (1997) (explaining that enactment of the MHPA fails to demonstrate any congressional view that "the ADA [does] not preclude mental health limitations in insurance plans").

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or, alternatively, granting certiorari, vacating the judgment below, and remanding for reconsideration in light of *Olmstead*.

Respectfully submitted.

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